it served as a sufficient deterrent to the offender, no doubt, the most important consideration in the case of a pecuniary punishment is the means of the offender." The first charge was one for which in law the respondent could have been sentenced to a term of imprisonment not exceeding six months or a fine not exceeding $2,500 or to both such imprisonment and fine. On that view, therefore, the learned magistrate is trying to justify himself making an order which he knows to be manifestly incorrect and was not made in accordance with accepted principles governing the exercise of discretion. He said he was fully aware of the dangers posed to third parties by lack of insurance cover for pirate taxis. He seeks to justify his order for release by saying that the respondent will be punished under section 74(2) for an offence of operating a vehicle without third party insurance. For that offence the punishment could have been a term of imprisonment not exceeding three months or a fine not exceeding $1,000 or both. It can be seen therefore that the learned magistrate wholly disregarded the relevant factors to be considered in regard to the offence for which the respondent was charged. The court, he says, has to keep in mind in sentencing a lone and itinerant operator of a pirate taxi. He further says that the offence does not involve any degree of moral turpitude whatsoever, and the person who commits it is very often otherwise of industrious habits and good moral character concerned with the maintenance of his family. I do not know what the learned magistrate means by moral turpitude when such conduct on the part of the respondent could render a family destitute by taking away the breadwinner of the family and leave the dependants without any claim against the insurance company. I do not know how far he wished to stretch moral turpitude but it is disgraceful if people such as the respondent can be permitted to operate pirate taxis for personal gain without thought for members of the public and their passengers as also other users of the road who will not be covered as a result of injuries occasioned by him from the running of the pirate taxi.

Forfeiture, he said, must be regarded as being in the nature of a punishment and where the law gives the court a discretionary power to forfeit property it must be exercised with a great deal of care and regard must be had to various factors such as the maximum pecuniary punishment for the offence, the pecuniary punishment it is contemplated to impose, the value of the property liable for forfeiture and the deterrent effect of forfeiture.

I am unable to gather from his judgment which of these principles which he quotes from he had followed but it is quite clear that he thinks forfeiture is only a deterrent to the offender. When the law provides for forfeiture for offences of this nature the law seeks to deter the respondent and others like-minded from the type of offences, having regard to the fact that people carried in these taxis and people are not insured and are wholly unprotected by any form of insurance cover.

When the Federal Court itself in *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*[2] said that the discretion has to be considered in terms of an innocent owner whose car was taken and used by the driver on some isolated occasion, e.g. as a result of theft and that the court might not, in such circumstances, decree forfeiture of the vehicle. The learned magistrate appeared to have failed to consider this aspect in deciding on his order for release. Having regard to the background of this case, I would say that this is a deliberate offence. It was not committed all of a sudden and on an isolated occasion but it was a course of conduct that had been pursued over a period of time. In no circumstances could it be considered that the learned magistrate was exercising his discretion according to accepted principles, and, as now stated by the respondent, he had already sold the vehicle. I would only repeat again that there is an obvious neglect of duty on the part of the learned magistrate in not ensuring that the release of the vehicle would only be made after the period of appeal had lapsed and when the notice of appeal had been lodged, he should see to it that the release would be upon a bond to produce the vehicle before the court in the event of his decision being reversed by the appellate court. To my mind, that neglect was wilful and deliberate, due to his conceited opinion of himself. In this case, it is now too late for me to order forfeiture.

The ground of appeal should have been purely on the question whether the learned magistrate in ordering the forfeiture or release of this vehicle had exercised the discretion in accordance with accepted principles. I have no hesitation despite his learned 30 page judgment to say that he has failed to do so. In the event, there will be no order on this appeal.

No order.

GOH YEW CHEW & ANOR. v. SOH KIAN TEE

[F.C. (Azmi L.P., Suffian & Ali F.JJ.) October 31, 1969]

[Kuala Lumpur — Federal Court Civil Appeal No. X. 31 of 1969]

Contract — Building contract — Impossibility of construction of building because of encroachment of neighbour's house into lot — Contract void ab initio — Claim for assessable expenses — Finding of fact by trial judge — Claim for forfeiture of deposit abandoned at trial — Appellant precluded from raising it on appeal.

In this case the appellant had undertaken to construct two buildings on land belonging to the respondent. The sum of $5,000 was paid by the respondent to the appellants as earnest money. It was found that owing to the encroachment of a neighbour's house into the lot it was not possible to construct the buildings according to the plans. In his action the respondent claimed the return of the sum of $5,000 as money paid for a consideration which had failed. The learned trial judge found that there had been no failure of consideration but that in the circumstances it was impossible *ab initio* to perform the contract. He held that the respondent was entitled to the balance of the deposit of $5,000 after deduction of all reasonable expenses incurred by the appellants. On appeal,

Held, dismissing the appeal: (1) as the appellants had at the trial abandoned their claim for a declaration that they were entitled to forfeit the deposit, they were precluded from raising the matter on appeal;

(2) in this case the court will not interfere with the learned trial judge's findings of fact as to what were the reasonable expenses incurred by the appellants.

Cases referred to:-

(1) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, 50.

(2) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.

FEDERAL COURT.

H. B. Ball for the appellants.

P. Devadas for the respondents.

Cur. Adv. Vult.

Azmi L.P.: This is an appeal against the judgment of the High Court at Malacca.

On 10th February 1965, the defendants undertook to construct immediately two buildings for the plaintiff for the sum of $26,000 on plaintiff's land at Klebang Kechil, Malacca and at the same time the plaintiff paid the defendants $5,000 as an "earnest deposit". A few days later the defendants discovered that owing to the encroachment of a neighbour's house into the lot it was not possible to construct the buildings according to the plan supplied by the plaintiff. In the meantime the defendants had already extended and strengthened an existing bridge on the land for transport of materials by lorries and also built a storehouse. The defendants informed the plaintiff of the obstruction. The plaintiff suggested the defendants proceed to construct one building only first but this the defendants refused to do. The defendants suggested alteration in the plan but this the plaintiff declined to do. A lot of correspondence passed between them through their respective solicitors. By a letter dated 7th July 1965 the plaintiff suggested that the defendants should treat the agreement as no longer enforceable subject to their refund of the deposit less any deductions for the actual cost of materials alleged to have been purchased by the defendants. Thereupon the defendants, agreeing with this suggestion, sent a list of expenses including cost of strengthening the bridge and construction of the storehouse totalling $4,472.72 and expressed willingness to return to the plaintiff $527.28 together with the materials purchased. The plaintiff did not agree to this, so the matter ultimately came to the court.

The plaintiff filed a claim for the return of $5,000 as money paid by him to the defendants for a consideration which has wholly failed. He also alleged in his statement of claim that the defendants have not made any attempt to start work on the site or alternatively have not been able to start work on the site as the width of the proposed buildings was more than the width of the building site. He also based his claim for the return of the deposit on the ground that the contract between them has been frustrated.

The defendants denied that the consideration has wholly failed or failed at all but maintained that they have made an attempt to start work on the site and also maintained that the width of the proposed buildings was not more than the width of the said land on which the buildings were to have been erected. They counterclaimed that they were entitled to forfeit the deposit and for the payment of $4,472.72 or alternatively claimed for money variously spent and described in the counter-claim.

According to the learned trial judge, as apparent from his own notes at the trial and in his own judgment, both counsel consented or agreed that the court tried the matter upon the following issues:

(1) as on the agreement dated 10th February 1965 whether there was any failure of consideration.

(2) whether as on the said agreement there was an impossibility of performance of the contract i.e. whether there was a frustration of the contract on the date when the agreement was signed.

(3) if there was impossibility of performance of the contract was any party to blame.

In his judgment the learned judge decided the three issues set out by him as follows:—

As to the first issue he pointed out that the consideration in the agreement was to construct two two-storied shop houses on the site for the sum of $26,000 and that the defendants were ever ready and willing to build these houses right from the date of the agreement and in order to carry out their part of the bargain proceeded to construct a bridge and a storehouse at the site but were unable to commence the construction of the houses because of the discovery of the encroachment on to the building site from a house on the neighbouring land. He thereupon concluded that on the first issue there was no failure of consideration on the date when the agreement was signed.

He disposed of the second issue by stating that the encroachment from the adjacent land was not discovered until about a fortnight after the agreement was signed and though there was no direct evidence to show when the building on the adjacent land was built, he inferred from the circumstances that it was in existence when the agreement was signed and therefore it was impossible *ab initio* to perform the contract. It should be noted that in reference to the second issue the learned judge in his reasoning did not refer to or mention the word "frustration" of the contract. In fact as I understand from his judgment he found this issue in favour of the defendants.

As to the third issue, the learned judge pointed out that both parties agreed that the construction of the two shop houses could not be commenced because of the encroachment and for that reason he came to the view that the site was not available at the time of the signing of the contract. He then went on to say in effect that there was an implied term of a contract of this nature that the building site should be handed over to the contractor within a reasonable time of the signing of the contract but as there was encroachment on the building site, he came to the view that the plaintiff had failed to hand over the site to the defendant. Also it was due to the plaintiff's negligence that the existence of the obstruction was not discovered earlier. The learned judge therefore concluded that on the third issue, the plaintiff was to be blamed.

Then without further discussion, the learned judge went on to say that in the circumstances he found that the plaintiff was only entitled to the balance remaining of the earnest deposit of $5,000 after deduction had been made for all reasonable expenses incurred by the defendants in pursuance of the agreement and then went on to deal with defendants' counter-claim of $4,472.72. On this question he allowed defendants' claim for the purchase of second-hand materials for building the store and for the construction of the

extension to the existing bridge for the transport of materials by lorries to the site and for labour charges, (Claims under Exhibits D.5, D.6 and D.7) totalling $511.58. He dismissed defendants' claim for expenses disclosed in bills Exhibits D.8, D.9 and D.10 for the alleged purchase of roof tiles, cement and iron bars. The learned judge apparently rejected these claims because the various materials were not taken to the building site and he regarded second defendant's explanation for not doing so unsatisfactory, and also the fact that the defendants were building contractors for the construction of other buildings too. He thereupon gave judgment in favour of the defendants for the sum of $562.74 which included 10% profit, and he also ordered that the balance of $4,437.26 be returned to the plaintiff together with 6% interest from the date of the action up to the date of judgment and also costs for the plaintiff. He also awarded costs to the defendants on the counter-claim for $562.74. The defendants appealed.

The first ground of appeal is as follows:

(1) The learned judge erred in law and fact in finding that the plaintiff is entitled to the balance remaining of the earnest deposit of $5,000 after deduction had been made for all reasonable expenses incurred by the appellants in pursuance of the agreement dated 10th February 1965 or entitled at all.

In reference to this matter I wish to point out that originally the defendants in their counter-claim asked *inter alia* for the following:

(a) A declaration that the defendants are entitled to forfeit the deposit made by the plaintiff on 10th February 1965.

(g) Damages for breach of contract.

I found out that the defendants' counsel at the trial in the course of his address to the court informed the court, I quote from the judge's notes:

"That he was dropping the counter-claim in respect of item (a) and to stick only on the actual amount of expenditure incurred by the defendants in this case."

And he then went on to inform the court that the defendants were claiming for (1) $4,472.72 (2) $65 (3) $351.50 for storage up to the date of the trial. Counsel also informed the court that he was also dropping out the counter-claim on items (f) interest on the special damages at 6% per annum from the date of judgment to the date of realization and (g) damages for breach of contract, and therefore went on the judge's notes, the claim by the defendants against the plaintiff was for the sum of $4,889.22 and costs. It is therefore apparent from these notes that counsel for the defendant had abandoned these various claims including a claim for the forfeiture of the deposit. I also note the fact that neither counsel had therefore addressed the court on the question of forfeiture. Neither did the judge in his judgment refer to it. In my view therefore the defendants are precluded from raising the matter again before this court. For that reason I would dismiss the first ground of appeal.

The next three grounds of appeal were in reference to the judge's judgment rejecting defendants' claims in reference to the roof tiles, cement and iron bars. First, it was pointed out that the learned judge was wrong in fact in finding that the explanation given by the defendants for not storing the roof tiles, cement and iron bars at the site was unsatisfactory.

It was submitted on behalf of the defendants that the learned judge had in fact made a finding of fact that these materials were purchased and his reason for disallowing them and also for disallowing the payment in respect of Exhibit D.10, were merely from the fact that the defendants were building contractors and the judge's view that the defendants' explanation was unsatisfactory for not storing the building materials at the site. It was suggested as the judge had in fact found these materials had been purchased he was bound to give credit to the defendants for the money they had spent. In my view, the learned judge had rejected this counter-claim because he was not satisfied with second defendant's explanation that he purchased them for the construction of plaintiff's houses since some of those materials at any rate were purchased after the defendants knew that the construction of the houses could no longer be carried out, and also the fact that defendants being building contractors need not have bought them for the construction of plaintiff's houses. I feel disinclined to interfere with these findings of facts made by the learned judge, particularly as to my mind these findings of facts were also based on credibility. As Lord Diplock has stated in the Privy Council case of *Tan Chow Soo* v. *Ratna Ammal*:[1]

"An Appellate Court, particularly where there is no full transcript of the oral evidence, is in a far less advantageous position to decide an issue of credibility then the trial judge who heard the evidence in full and observed the witnesses as they gave it, noting their pauses and their hesitations and any visible signs of confidence or embarrassment."

I think I should also say something about the law concerning frustration of contract since the point was raised and argued before us. The counsel for the appellant quite rightly said that since the learned judge had found as a fact that it was impossible *ab initio* to perform the contract this was not a case of a frustration of contract. The doctrine of frustration is relevant only when there is a change of circumstances after the formation of the contract which renders it physically or commercially impossible to fulfil and it does not concern itself as in this case with the initial impossibility which renders a contract void *ab initio*. However, for reasons which I had previously stated I have to dismiss the appeal with costs.

Suffian F.J.: I agree that this appeal be dismissed with costs.

Ali F.J.: This is an appeal from the judgment of Pawan Ahmad J. in Malacca Civil Suit No. 164 of 1965 in which the respondent claimed the return of $5,000 paid to the appellants under a written agreement dated the 10th February, 1965. The arrangement agreed between the parties was that the appellants were to build for the respondent two two-storeyed shop houses on the respondent's land, simply described as "Klebang Kechil, Malacca", for the sum of $26,000. On the date of the agreement a sum of $5,000 was paid as "earnest deposit". About two weeks later, the appellants found that the site for the proposed buildings

was not wide enough to enable them to start construction work in accordance with the approved plans. The respondent was duly informed of this and after the site was surveyed in June or July, 1965, it was discovered that a building erected on the adjacent lot has encroached upon the proposed site. By that time, of course, the five months period fixed by the agreement for building the two shophouses was about to expire or had expired. In the meantime an attempt was made by the respondent to vary the terms of the agreement so that the appellants could construct part of the building. The appellants were agreeable provided fresh plans were provided. Nothing came out of this and eventually the respondent suggested that the agreement be treated as at an end upon certain terms. Negotiations for settlement of these terms, particularly with regard to the $5,000 and with regard to certain expenses incurred by the appellants in the preparatory stage failed to produce any result. The respondent commenced this action claiming the return of the $5,000. As endorsed on the specially indorsed writ the claim was founded on the ground that the money was paid for consideration which has wholly failed; but in one of the particulars of the claim (No. 6) the respondent averred "by reason of the premises the said contract has been frustrated and the plaintiff is entitled to recover the said sum of $5,000." The defence to the claim (paragraph 4) was a denial that the money was paid for consideration which has wholly or partly failed. The reason for this statement apparently, as explained in paragraph 5, is that the appellants have made attempts to start work on the site, particulars of which were set out. On these premises the appellants denied that the contract has been frustrated. The manner in which the legal contentions were raised by the pleadings appears to have led to some difficulty in ascertaining the legal issues involved for determination. Accordingly, agreed issues were framed and they are:

(1) As on the agreement dated 10th February, 1965 whether there was any failure of consideration.

(2) Whether as on the said agreement there was an impossibility of performance of the contract, i.e. whether there was a frustration of the contract on the date when the agreement was signed.

(3) If there was impossibility of performance of the contract was any party to be blamed.

On issue No. (1), the learned trial judge found that there was no failure of consideration on the ground that the appellants —

"were ever ready and willing to build these houses right from the date of the agreement was signed and in order to carry out their part of the bargain the defendants proceeded to construct a bridge and a store at the site but they were unable to commence with the construction of these shophouses because they subsequently discovered that the building from the adjacent lot was encroaching on to the building site and therefore they notified the plaintiff of this obstruction."

I take these words to mean that there has been part performance of the contract by the appellants. But as I understand it the respondent's contention was that the consideration for which the money was paid has wholly failed because he did not get what he bargained for, that is, the two two-storeyed shop-houses, which the appellants promised to construct. However, this finding on issue No. (1), rightly or wrongly, was clearly in favour of the appellants and there is no cross appeal against it.

On issue No. (2), upon an inference that the encroachment to the proposed site was in existence when the agreement was signed, the learned trial judge found, and I quote the words from his judgement, "it was impossible *ab initio* to perform the contract." This, in my judgment, is a reasonable inference. By the words "it was impossible *ab initio* to perform the contract", the learned trial judge must be taken as saying that the contract was void *ab initio* in the sense that it was impossible for the parties to the contract to carry out their respective bargains. As far as the appellants were concerned, the express condition going to the root of the contract governing their part of the bargain was the availability of a proper site on which the proposed building could be constructed in accordance with the approved plans. This express condition was non-existent when the agreement was signed. In this context the finding on issue No. (2) is that there has been a total failure of consideration — a finding which is somewhat contrary to that on issue No. (1). This issue No. (2), as may be noticed, is concerned with frustration of contract which is distinguishable from the doctrine of failure of consideration. As stated in paragraph 1171 of *Chitty* on Contracts, 22nd Edition — General Principles — on page 503:

"The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfil the contract. The doctrine is not concerned with initial impossibility which renders a contract void *ab initio*, as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement."

So far as the respondent's claim as pleaded was founded on a frustration of contract, the finding on issue No. (2), in view of the principle of frustration just referred to, is clearly against him. If the matter is to rest here, the claim as pleaded must fail. But treated as a finding that there has been a total failure of consideration the conclusion of the learned trial judge that the respondent is entitled to the return of the money paid can be supported on the principle that the respondent's right to recover the money arises, not *ex contractu*, but by operation of law since the common law gives a remedy in quasi-contract to a party who has not got what he bargained for. This principle or doctrine of failure of consideration was stated by Viscount Simon L. C. in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*[2] in these words:

"The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use..."

On issue No. (3), the learned trial judge found that the respondent was to blame for having failed to discover the encroachment when the agreement was sign-

ed. In my judgment this issue is irrelevant either to the doctrine of frustration or to the doctrine of failure of consideration. Both parties entered into the contract believing in good faith that it was possible for the two shop-houses to be constructed on the proposed site. Both were mistaken as to the area available. There was no question of illegality or fraud which an innocent party could take advantage of for the purpose of avoiding the contract.

Although in the circumstances of this case there is justification for ordering a retrial, it is not necessary to adopt this course of action as the learned trial judge has found on the facts that the contract was void *ab initio* in the sense that there has been a total failure of consideration. On the principle stated by Viscount Simon L. C. in the *Fibrosa* case, already referred to in this judgment, this is sufficient ground for dismissing this appeal. But in fairness to the appellants it has to be stated here that the finding on issue No. (1), so far as this was in their favour, can by no means be of much assistance to them. The fact that they have made an extension to the bridge and constructed a store for the purposes of transporting and storing building materials can hardly constitute part performance of the contract. There was no evidence that construction work on the proposed buildings has actually started. On the date of the agreement the appellants were given the approved plans for the proposed buildings as well as for the site. If they had acted, as any reasonable person would have acted in the circumstances, by visiting the site, they could not have failed to discover, before incurring any expenses, that it was impossible to carry out their part of the bargain under the contract. They could easily have done so but did not, probably because they assumed that everything was in order. To blame the respondent for a mistake which could easily have been avoided is something which the court will not countenance. In this case they were not altogether unfortunate because the learned trial judge has, rightly or wrongly, awarded them something for their trouble. I do not feel disposed to interfere with this award. Strictly speaking, the appellants have no cause of action for their counter-claim.

Although the $5,000 claim was paid as "earnest deposit" nothing really turned on the question whether it was liable to forfeiture. The reason for this was clearly because the respondent's claim was not based on the contract. Originally the appellants have counter-claimed for a declaration that they are entitled to forfeit the deposit but this was abandoned at the trial. In their written submission (page 6) they gave an explanation for so abandoning but this adds nothing to the merits of their appeal. Both parties were well aware of the position when they discovered that it was impossible to carry out their respective bargains under the contract. In the *Fibrosa* case, *supra*, which is mainly concerned with frustration of contract, at page 49 Viscount Simon L.C. said:

"While this result obviates the harshness with which the previous view in some instances treated the party who had made a prepayment, it cannot be regarded as dealing fairly between the parties in all cases, and must sometimes have the result of leaving the recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connexion with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons which are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances — contrast the provision, now contained in s. 40 of the Partnership Act, 1890, for apportioning a premium if a partnership is prematurely dissolved. It must be for the legislature to decide whether provision should be made for an equitable apportionment of prepaid moneys which have to be returned by the recipient in view of the frustration of the contract in respect of which they were paid."

Lord Wright in the same case at page 72 said to the same effect in these words:

"... No doubt, in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which become valueless to him when the contract fails, so that he gets nothing and has to return the prepayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back. It is further imperfect because it depends on an entire consideration and a total failure. Courts of equity have evolved a fairer method of apportioning an entire consideration in cases where a premium has been paid for a partnership which has been ended before its time: Partnership Act, s. 40; contrary to the common law rule laid down in *Whincup* v. *Hughes* L.R. 6 C.P. 78. Some day the legislature may intervene to remedy these defects."

Indeed in the case of frustrated contracts the legislature in this country has in fact intervened by making provisions in section 15 of the Civil Law Ordinance 1956. But the learned trial judge's conclusion is clearly to the effect not that the contract has been frustrated but that it was void *ab initio* so that there was a total failure of consideration. The adjustment of rights and liabilities under section 15 of the Ordinance, as was done in this case, should not have been carried out. In the event that has happened the common law rule that the appellants cannot recover expenses incurred must apply. I would dismiss this appeal.

On the question of costs, it cannot be overlooked that the respondent is not altogether free from blame for having pleaded frustration of contract as a legal issue, thereby creating a situation in which the appellants were compelled to bring this appeal. I would make no order on the costs of this appeal.

Appeal dismissed.

Solicitors: *Allen, Gledhill & Ball; Devadas & Co.*